TABLE OF CONTENTS

Page

List of Authorities ii

Jurisdiction 1

The Facts 3–8

There Was More Involved in The Bexar County Transaction Than a Mere Arms-Length Conveyance of Realty 4

The Law 8–18

The Bexar County Transaction Involved The Sale and Purchase of a Security 8

The Exemptions in the 1933 and 1934 Acts Have No Application to This Case 10

Even if the Trial Court Did Not Have Original Jurisdiction of Owen's Claims, Which is Denied, It Had Ancillary Jurisdiction 12

The Trial Court Had Pendent Jurisdiction to Hear, and Award Recovery on, Owen's Nonfederal Claims 13

The Trial Court Did Not Abuse His Discretion In Allowing Riley to Assert His Claims And In Allowing Owen to Prosecute His Cross-Claim Against Jones 14

The Trial Court Did Not Abuse His Discretion In Granting the Bank's Motion to Dismiss the Counterclaims of Jones 16

The Trial Court Did Not Err In Excluding From the Jury the Settlement Agreement Between the Bank, Riley and Owen 16

The Questions Submitted To the Jury Fairly Presented the Theories of Recovery and Defense 17

Under Owen's Theories of Recovery, The Judgment Rendered For Him The Relief To Which He Was Entitled 18

Conclusion and Prayer 21

Certificate of Mailing 22

Appendix 23

LIST OF AUTHORITIES

Cases: *Page*

Associate Securities Corporation v. SEC, 293 F.2d 738, 741-42 (10th Cir. 1961) 11

Brooklyn Union Gas Co. v. Transcontinental Gas Pipe Line Corp., 201 F. Supp. 679 (D.C. Tex. 1960) aff'd 299 F.2d 692, cert. den'd, 371 U.S. 887, 83 S.Ct. 182, 183, 185, 9 L.Ed.2d 121 13

Brown & Root, Inc. v. Gifford-Hill & Co., 319 F.2d 65 (5th Cir. 1963) 14

Childress v. Cook, 245 F.2d 798 (5th Cir. 1957) 13

Cochran v. Channing Corp., 211 F. Supp. 239 (D.C. N.Y. 1962) 14

DeWitt v. Sorenson, 288 F.2d 455 (5th Cir. 1961) 18, 20

Donahue v. Davis, 68 So.2d 163 (Fla.Sup. 1953) 20

Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961) 14

Errion v. Connell, 236 F.2d 447 (9th Cir. 1956) 10, 14

Fitz-Gerald v. Hull, 237 S.W.2d 256 (Tex.Sup. 1951) 18

Hill York Corp. v. American International Franchises, Inc., 448 F.2d 680, 695-696 (5th Cir. 1971) 11

Hurn v. Oursler, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed.2d 1148 (1933) 13

Jung v. K. & D. Mining Co., 260 F.2d 607 (7th Cir. 1956) 14

McComb v. McCormack, 159 F.2d 219, (5th Cir. 1947) 13

Miller v. Bargain City, U.S.A., Inc., 229 F. Supp. 33 (D.C. Pa. 1964) 14

Meinhard v. Salman, 249 N.Y. 458, 164 N.E. 545, 546 (Ct. of App. N.Y. 1928) 3

Moe v. Lowry, 194 P. 363 (Colo. Sup. 1921) 20

Pawgan v. Silverstein, 265 F. Supp. 898 (D.C. N.Y. 1967) 11

Revere Copper & Brass, Inc. v. Aetna Cas. & Surety Co., 426 F.2d 709 (5th Cir. 1970) 13

LIST OF AUTHORITIES (Continued)

Page

Scott v. Fancher, 369 F.2d 842 (5th Cir. 1966) 13
S.E.C. v. C. M. Joiner Corp., 320 U.S. 344, 351, 64 S.Ct. 120, 88 L.Ed. 88, 93 (1943) 9
Securities & Exchange Commission v. Federal Shopping Way, Inc., 433 F.2d 148 (9th Cir. 1970) 9
Tcherepnin v. Knight, 389 U.S. 332, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967) 9
United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) 14
Weber v. C.M.P. Corp., 242 F. Supp. 321 (D.C. N.Y. 1965) 14
Whittaker v. Wall, 226 F.2d 868 (8th Cir. 1955) 19
Wood v. Precise Vac-U-Tronic, 192 F.Supp. 619 (D.C. Pa. 1961) 14
Woodward v. Wright, 266 F.2d 108, 116 (10th Cir. 1959) 11

Statutes:

Supreme Court Rules
Rule 19 ..... 1, 2
F.R.C.P.
Rule 13 16
Rule 13(g) 12
Rule 20(a) 15
Rule 20(b) 15
Rule 42 16
15 U.S.C.A.
Article 77b(1) 8
Article 77c(a)(10) 9
Article 77d 10, 11
Article 77e 11
Article 77l(2) 11
Article 77q 10, 11
Article 77q(a) 7
Article 77q(c) 10
Article 77v(a) 9
Article 78aa 9
Article 78c(12) 11

LIST OF AUTHORITIES (Continued)

Page

Securities Act of 1933 9
Securities Exchange Act of 1934 9
Rule X-10B-5 7
Business and Commerce Code of Texas 18, 23

Treatises:

Bromberg, Securities Law 11
II Loss, Securities Regulation Ch. 6A(b)(i) 9, 11
11 Sowards Business Organizations 11
3 Moore's Federal Practice 13

Encyclopedias:

46 American Jurisprudence 2d 20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1068

RICHARD M. JONES, *Petitioner*

v.

NOR-TEX AGENCIES, INC., W. E. RILEY, CHARLES OWEN and CONTINENTAL NATIONAL BANK OF FORT WORTH, *Respondents*

Respondent Charles Owens's Reply to Petition for Writ of Certiorari

To The United States Court of Appeals
For The Fifth Circuit

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

JURISDICTION

Respondent Charles Owen denies that this Honorable Court has jurisdiction to entertain the Petition for Writ of Certiorari sought by Petitioner, Richard M. Jones, and, therefore, such Petition should, in all things, be denied.

The record before this Court does not bring this case within the purview of Rule 19, Supreme Court Rules. There is no "special and important reason" for a review on writ of certiorari of the decision of the Court

of Appeals (reported at 482 F.2d 1093). Petitioner cannot contend that the Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, has decided an important question of federal law not heretofore decided or has decided a federal question in a matter which conflicts with applicable decisions of this Court. Neither has the Fifth Circuit here "decided an important state or territorial question in a way conflicting with applicable state law," nor has it so departed from the accepted and usual course of judicial proceedings, the only remaining reason under Rule 19, to warrant this Court's power of supervision.

Petitioner, in a shrill and hysterical manner, claims, as he always has, that Respondents colluded against him. In addition, he now claims or implies that the trial court cooperated in this collusive scheme (Pet. p. 11); that it was the "unwitting dupe" of the Respondents (Pet. p. 9); that it and the appellate court were guilty of "unfair practices" (Pet. p. 35); that it systematically destroyed Petitioner's chance to secure favorable jury findings (Pet. p. 46); that it entered into a "concerted plan" with Respondents to withhold clearly admissible evidence from the jury (Pet. p. 52); and, that it distorted the case (Pet. p. 52). Petitioner then accuses the Court of Appeals of perfunctorily reviewing the case (Pet. p. 46) and, further, charges that its holding is an "absurdity" (Pet. pp. 40 & 45) and "ludicrous" (Pet. p. 42).

The fact is, simply stated, that the trial judge and

the Court of Appeals merely applied established law to the jury's findings of fact and, in so doing, struck down acts of fraud so blatant and cynical as to be utterly repugnant even to the "morals of the market place."[1]

THE FACTS

The Statement of the Case in the Petition for Writ of Certiorari filed herein is devoid of a single, specific reference to the transcript or the record on appeal. Instead, Petitioner (hereinafter sometimes referred to as "Jones") is content to place himself before this Honorable Court, not surprisingly, with a highly biased, simplistic, emotional, incomplete and inaccurate statement of the case. Taken unchallenged, Petitioner's rendition of the operative facts and law would have, under any circumstances, entitled him to a direct verdict. For these reasons, Respondent (herinafter referred to as "Owen") chooses to state the facts as shown *by the record on appeal*, some of which are contained in the opinion by the Fifth Circuit Court of Appeals, all of which should be brought before this Court.

---

[1]Mr. Justice Cardozo in *Meinhard v. Salman*, 249 N.Y. 458, 164 N.E. 545, 546 (Ct. of App. N.Y. 1928).

There Was More Involved in The Bexar County Transaction Than a Mere Arms-Length Conveyance of Realty

In April of 1967, Owen was approached by Jones to form a joint venture in order to purchase a 420-acre tract of land in Bexar County, Texas, from Mr. Robert Maddox for a total price of $260,000 (Tr. 1724), or $130,000 each (Tr. 44-46; 49-50; 1724). However, Jones emphasized to Owen that he had a special situation with Maddox and that Owen should not talk to Maddox about the proposal (Tr. 60). Jones further told Owen that in addition to having five oil wells on the property, it also had huge gravel deposits which were very valuable (Tr. 47). Owen then contacted a Mr. James Williford to inquire whether he would be interested in a one-third interest in the venture (Tr. 51-52; 161-163). On April 23, 1967, Owen and Jones drove to San Antonio and met with Williford to look over the property (Tr. 1720). On this occasion, Jones reaffirmed that the purchase price of the property from Maddox was $260,000 (Tr. 66; 166; 170; 196-197); and, with the oil reserves being what they were, and with the amount of gravel there, that $260,000 was a good price from the buyers' standpoint (Tr. 66; 167-168). A few days later Jones called Williford and encouraged him to come into the venture on the basis that Jones, Owen and Williford would purchase the property from Maddox and each would then own one-third (Tr. 173). On April 28, 1967, Jones told Owen that Maddox would hold the offer open for another thirty

days if he could get $21,000 option money (Tr. 53). He further told Owen that he, Jones and Williford should each put up $7,000 (Tr. 53). On May 1, 1967, Owen drew a check payable to Jones for $14,000, representing his and Williford's share of the option price of $21,000 (Tr. 55; Tr. 1132; OX 12).[2] Owen received by mail from Jones a letter which reduced the agreement to writing (OX 1). Williford was unable to arrange financing to enter into the venture (Tr. 67, 69; 173-174). However, Jones offered to continue it on a 50-50 basis with Owen (Tr. 69) even though (according to what Jones told Owen) Jones's wife would have to sell her fur coat and Cadillac in order for Jones to be able to put up his part (Tr. 70). This impressed Owen and he agreed to participate. On May 31, 1967, he drew another check payable to Jones for $36,333.33 (OX 13) and signed a promissory note to Jones for $79,666.67 (OX 11), which, together with the $14,000 previously delivered to Jones, made Owen's total investment $130,000 (Tr. 40; 74). Owen then received a deed dated May 31, 1967, from Jones and his wife (Tr. 76-78; OX 2) conveying a one-half undivided interest in the 420-acre tract, *along with an undivided one-half interest in the mineral estate (subject to an oil and gas lease covering the south 200 acres) and one-half of Jones's 1/6 royalty interest.*

Unknown to Owen, Jones actually had contracted to purchase, and did in fact purchase, the entire tract

[2]For clarity, the following reference is made: OX – Owen Exhibit.

from Maddox for $125,000 (Tr. 39).[3] Owen did not find this out until January 5, 1970, when Respondent Riley's attorney was taking his deposition in this litigation (Tr. 897). In short, Jones purchased the entire tract from Maddox for $125,000 and immediately, as a part of the transaction, conveyed an undivided one-half interest to Owen for $130,000, all the time representing to Owen that the purchase price from Maddox was $260,000. Jones in fact used Owen's money in order to pay Maddox.

In July of 1968, Jones and Owen conveyed an undivided one-third (or 1/6th each) interest to Riley for an agreed total consideration of $100,000 (Tr. 40).

Riley instituted this suit against Jones and Owen for rescission of the note he executed in their favor (R. 1). Owen filed an answer denying that he was liable to Riley (R. 79). Subsequently, when Riley's attorney was taking his and Jones's depositions, Owen learned for the first time that Jones had deceived him as well as Riley; that Jones in fact had used Owen's money to purchase the Maddox property for $125,000, told Owen that the cost was $260,000 and in effect had charged Owen $130,000 for his one-half interest in the $125,000 joint venture. Owen thereupon amended his pleading to assert a cross-claim against Jones for damages. Owen's cross-claim alleged that Jone violated the anti-fraud provisions of the Securi-

[3]On the deed running from Maddox to Jones, Jones placed and cancelled with his initials revenue stamps reflecting that he paid Maddox $260,000 for the property (Tr. 78-85; 1528; OX 27)! On the deed running from Jones and wife to Owen, however, the correct amount of revenue stamps were placed by Jones on the deed showing a consideration of $130,000 (Tr. 78, 85; OX 2).

ties Act of 1933[4] and the Securities Exchange Act of 1934[5]; that Jones was liable to Owen because he violated Section 27.01 of the Business and Commerce Code of Texas[6]; that Jones breached his fiduciary duties to Owen and, therefore, held his interest in the Bexar County tract in trust for Owen's benefit; and, that Jones made a secret profit at the expense of his co-venturer, Owen, and should be made to account for it.

Trial was to a judge and jury. The jury returned a verdict (R. 386-450) which, by its answers to 49 separate questions, determined all issues against Jones (except that it refused to award Owen exemplary damages) and in favor of Owen and Riley. The jury was submitted separate issues predicated on violations of the Securities Acts, Section 27.01, supra, and violations of common law fiduciary duties. Each and every element encompassed by those theories was submitted to the jury (R. 386-450). Based on the jury's verdict, the trial judge rendered his judgment (R. 514) which, inter alia, granted Riley all relief prayed for by him. The judgment was joint and several, being against *Owen* as well as Jones (a point Petitioner never mentions as it is not in keeping with his "brother-in-law" theory). This part of the judgment was based on the jury's findings that even though *Owen* made no false representations, and had no knowledge that Jones had done so (R. 445), nevertheless Jones's false statements to Riley were made within the scope of the joint ven-

[4]15 U.S.C.A. §77(q)(a) sometimes cited as §17(a).
[5]Rule X-10B-5, promulgated pursuant to such Act.
[6]Reproduced verbatim in the Appendix.

ture of Owen and Jones (R. 446); thus, Owen was vicariously liable to Riley. The judgment also awarded Owen all affirmative relief prayed for by him against Jones.

THE LAW

The Bexar County Transaction Involved The Sale and Purchase of a Security

As we understand it, Jones makes the argument that the sale by him to Owen did not involve a security and that their subsequent sale to Riley likewise did not involve a security. Arguing further, Jones says that even if these were sales of securities, they were "exempt" and no liability could attach to him. We disagree.

It should be remembered at the outset that by deed dated May 31, 1967, Jones and his wife conveyed to Owen an undivided one-half of the surface as well as an undivided one-half of the mineral estate which was subject to an existing oil and gas lease covering only the South 200 acres, plus an undivided one-half of their royalty interest (OX 2). Further, it included one-half of the gravel. The 1933 Act defines a security as follows: "(1) The term 'security' means any note . . . *fractional undivided interest in oil, gas or other mineral rights* . . ."[7] (Emphasis added). The 1934 Act thus defines a security: "(10) The term 'security' means any note . . . certificate of interest or participation in any profit-sharing agreement or in *any oil, gas*

[7]15 U.S.C.A. §77b(1)

or other mineral royalty or lease . . ."[8] (Emphasis added).

Owen submits that, *by definition*, he purchased a security from Jones. The '33 Act gives the federal courts concurrent jurisdiction with the state courts of suits brought pursuant to it,[9] and the '34 Act gives the federal courts exclusive jurisdiction of suits brought under it.[10] The definitions of a security as contained in the '33 and '34 Acts have traditionally been given an expansive, as opposed to a restrictive, interpretation.[11] *Tcherepnin v. Knight*, 389, U.S. 332, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967); *S.E.C. v. C. M. Joiner Corp.*, 320 U.S. 344, 351, 64 S.Ct. 120, 88 L.Ed. 88, 93 (1943).

Owen submits that, as a matter of law, the deed from Jones and his wife which conveyed to him an undivided one-half interest in the mineral estate and royalty rights, on its face answered to the description of a security as defined by the 1933 and 1934 Acts. Indeed, an ordinary royalty interest, whether or not undivided, is viewed as a security under the 1934 Act. II Loss, *Securities Regulations*, Ch. 6A(b)(i), p. 796.

Appellant Jones does not argue that the trial court had no jurisdiction because a "non-security" (the surface) was coupled with a "security" (the undivided

[8] 15 U.S.C.A. §78c(a)(10)

[9] 15 U.S.C.A. §77v(a)

[10] 15 U.S.C.A. §78aa

[11] The Ninth Circuit has recently held that a fractional undivided interest in real estate, *standing alone*, was a security under the '33 Act. *Securities & Exchange Commission v. Federal Shopping Way, Inc.*, 433 F.2d 148 (9th Cir. 1970).

interest in the mineral estate and royalty interest.) Nor could he. It is settled that a transaction in which a non-security is coupled with a security will be treated as a security. *Errion v. Connell*, 236 F.2d 447 (9th Cir. 1956).

In summary, the transaction between Jones and Owen involved a security as that term is and has been defined under the '33 and '34 Acts and, therefore, the trial court had original jurisdiction over both his and Riley's claims

The Exemptions in the 1933 and 1934 Acts Have No Application to This Case

Jones has always complained that the trial court had no jurisdiction because the sale to Owen was an "exempt" transaction. In his latest Brief, he insinuates this, although even he now seems to concede that this hypothesis has no validity.

The anti-fraud provisions of the '33 and '34 Acts are not diluted by the exemptions contained in those Acts. For example, in 15 U.S.C.A. §77q, it is provided in Subsection (c) in clear, unequivocal and unarguable language that:

> "(c) The exemptions provided in Section 77c of this title *shall not apply to the provisions of this section.*" (Emphasis added)

Nor it is material whether the transaction was "unregulated" when recovery is sought under the anti-fraud provisions. This is clear from the preamble to 15 U.S.C.A. §77d which describes "Exempted transac-

tions," including so-called "private offerings," wherein it is stated, "The provisions of Section 77e of this title shall not apply to — ." Of course, §77e is the section of the '33 Act which describes those transactions which are unlawful *unless a registration statement is in effect.* In short, by definition, those transactions described in §77d are exempt only from the registration provisions of §77e. If those same transactions were also exempt from the anti-fraud provisions, then the preamble to §77d would have stated that the transactions therein described were also exempt from the provisions of §771(2) and 77q. It does not. Neither is this transaction exempt under the '34 Act. 15 U.S.C.A. §78c(12). See *Hill York Corp. v. American International Franchises, Inc.*, 448 F.2d 680, 695-696 (5th Cir. 1971); *Woodward v. Wright*, 266 F.2d 108, 116 (10th Cir. 1959); *Associate Securities Corporation v. SEC*, 293 F.2d 738, 741-42 (10th Cir. 1961); *Pawgan v. Silverstein*, 265 F. Supp. 898 (D.C. N.Y. 1967); Bromberg, *Securities Law*, p. 82, §4.6 (210) wherein it is stated that Rule 10b-5 has application in "private transactions" and, "it is immaterial that such transactions may be exempt from the registration requirements of the 1933 Act . . ."; *Bromberg*, supra, at p. 22.9, §2.4(451) "Direct - Personal (Private) Transactions," and cases therein cited; *Bromberg*, supra, at pp. 39-40; 11 Sowards, *Business Organizations*, The Federal Securities Act. p. 10-2, §10.01[1]; II Loss, *Securities Regulation*, p. 710 (1961).

Owen will not here argue all of the testimony which

refutes the conclusion of Jones that he was superior to Jones in business experience and therefore not in need of the protection of the Securities Acts. Owen simply invites the Court's attention to the jury's answers to Question No. 43 (R. 440), which were well supported by clear and convincing evidence.

In summary, the question of whether this was a private offering and therefore exempt from the registration requirements is not here reached, since suit was grounded on the anti-fraud provisions of the '33 and '34 Acts.

Even if the Trial Court Did Not Have Original Jurisdiction of Owen's Claim, Which is Denied, It Had Ancillary Jurisdiction

Owen's cross-claim against Jones was filed under Rule 13(g), F.R.C.P., which provides:

> "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence which is the subject either of the original action or of a counterclaim therein *or relating to any property that is the subject matter of the original action . . .*" (Emphasis added)

In view of the fact that Owen's cross-claim related to the very same property that was the subject matter of Riley's complaint, it is easy to understand why the trial court entertained the cross-claim.

Even assuming, arguendo, that the court did not have an independent jurisdictional ground to entertain the cross-claim, which is denied for the reasons stated

above, still the court had ancillary jurisdiction over the cross-claim by virtue of its jurisdiction of the main suit. *Scott v. Fancher*, 369 F.2d 842 (5th Cir. 1966); *McComb v. McCormack*, 159 F.2d 219, (5th Cir. 1947); *Childress v. Cook*, 245 F.2d 798 (5th Cir. 1957); *Revere Copper & Brass, Inc. v. Aetna Gas & Surety Co.*, 426 F.2d 709 (5th Cir. 1970); *Brooklyn Union Gas Co. v. Transcontinental Gas Pipe Line Corp.*, 201 F. Supp. 679 (D.C. Tex. 1960), aff'd 299 F.2d 692, cert. den'd, 371 U.S. 887, 83 S.Ct. 182, 183, 185, 9 L.Ed.2d 121; 3 Moore's *Federal Practice*, pp. 97-98, §13.36.

The Trial Court had Pendent Jurisdiction to Hear, and Award Recovery on, Owen's Nonfederal Claims

As previously stated, Owen sued Jones for violation of federal fraud statutes, a state fraud statute and breach of fiduciary duties. The trial court heard evidence concerning all of Owen's claims (as well as Jones's defenses), submitted questions to the jury inquiring whether Jones had violated the federal and state laws (R. 428-450), and, based upon the jury's verdict, rendered judgment for Owen against Jones awarding Owen all relief prayed for (R. 514). (Jones fails to mention in his Petition that Owen secured jury findings on his nonfederal fraud theories.)

A federal court has "pendent" jurisdiction to hear and decide nonfederal claims joined with a claim arising under federal law. *Hurn v. Oursler*, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed.2d 1148 (1933). Whether to

exercise pendent jurisdiction is a matter for the discretion of the trial court. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). See also, *Brown & Root, Inc. v. Gifford-Hill & Co.*, 319 F.2d 65 (5th Cir. 1963); *Cochran v. Channing Corp.*, 211 F. Supp. 239 (D.C. N.Y. 1962); *Weber v. C.M.P. Corp.*, 242 F. Supp. 321 (D.C. N.Y. 1965); *Miller v. Bargain City, U.S.A., Inc.*, 229 F. Supp. 33 (D.C. Pa. 1964); *Jung v. K. & D. Mining Co.*, 260 F.2d 607 (7th Cir. 1956); *Errion v. Connell*, supra, at pp. 11-12; *Ellis v. Carter*, 291 F.2d 270 (9th Cir. 1961); *Wood v. Precise Vac-U-Tronic*, 192 F. Supp. 619 (D.C. Pa. 1961).

In summary, the trial court had original, ancillary and pendent jurisdiction to hear and decide all of Owen's claims against Jones, and to grant relief thereon.

The Trial Court Did Not Abuse His Discretion In Allowing Riley to Assert His Claims And In Allowing Owen to Prosecute His Cross-Claim Against Jones

Petitioner's argument that he was irreparable damaged by the trial court's decision to let Owen prosecute his cross-claim is a classic example of circular reasoning, i.e., he must have been prejudiced because the jury answered all issues against him.

The chronology of events leading up to the filing of this case in federal court has previously been called to the Court's attention. In summary, Riley obtained a joint and several judgment against Jones and Owen

for $81,763.77 (R. 514). There was no collusion between Riley and Owen. Riley was suing the Defendants jointly and severally. When he dismissed the action in state court and filed it in federal court, of course Owen filed his cross-claim against Jones. Owen did not want to "reap" prejudice against Jones. He only sought to show the court and jury how he, too, had been duped by the fraud of his pretended friend. Owen respectfully suggests to the Court that under this record he needed no "prejudice" to prove the willful and patent fraud practiced upon him.

Owen's liability to Riley could attach only vicariously, since the jury found that Jones's misrepresentations to Riley, unbeknownst to Owen, were made while he and Owen were joint venturers (R. 446). In this setting, it is hard to understand how Jones could speak of being prejudiced by Owen's claims. Indeed, one could hardly imagine more prejudice than that which would have befallen Owen had he not been able to prove to the same jury that considered Riley's claims against him, which arose solely from acts and omissions of Jones in the joint venture, his own claims of being defrauded by Jones. Had he not, he would have been placed, in the eyes of the jury, as being in league with a man who defrauded him in much the same manner as the jury found that this man defrauded Riley.

We simply invite this Court's attention to the opinion of the Fifth Circuit wherein it held that the trial judge, pursuant to Rules 20(a) and 20(b), F.R.C.P., acted within his discretion in allowing Riley to be

joined as a party-plaintiff and in refusing to sever Owen's cross-claim against Jones. See also, Rules 13 and 42, F.R.C.P.

The Trial Court Did Not Abuse His Discretion in Granting the Bank's Motion to Dismiss the Counterclaims of Jones

Jones argues that since Owen and Riley were seeking to cancel and rescind their notes to him he should have been allowed to pursue his actions against them on their notes. We disagree. Owen, as previously stated, was not seeking rescission. His suit was for damages.

The relevant portions of the agreement whereby Jones pledged the Owen note to the Bank (OX 31) are set forth in the opinion below. It is clear that, by contract, Jones, as pledgor of the Owen note, had no right, power or authority to sue on it or otherwise attempt to foreclose the lien securing it. The Bank, as pledgee, *and only the Bank*, had the sole and exclusive right to sue on the note. Absent its consent, which it refused to give, no action could be taken by Jones against Owen or Riley on the notes.

The Trial Court Did Not Err In Excluding From the Jury the Settlement Agreement Between the Bank, Riley and Owen

Jones is mistaken when he says that Owen contended in his trial amendment that his note was void or voidable as to the Bank (R. 371). A fair reading of that pleading entitled "First Amended Answer

of Cross-Plaintiff Charles Owen to Counterclaim of Cross-Defendant Richard M. Jones" shows that he denied that he was liable to Jones on the note; and, *as to Jones*, the note was void; or, in the alternative, voidable because it had been procured by fraud. The Settlement Agreement (JX 164)[12] *does not recognize the validity of the Owen or Riley notes in the hands of Jones.* That Agreement, inter alia, recognized that the Bank was a holder in due course of the Jones, Owen and Riley notes. Nowhere did Owen intend to plead, nor did he plead, that the Bank was not a holder in due course. Clearly the Agreement was not admissible to impeach or contradict Owen's pleadings or testimony. The Court is invited to read the Agreement, and it is submitted that under even the most liberal interpretation, the Agreement could not be used to ratify Owen's transaction with Jones, or estop him from making a claim against Jones, or demonstrate a waiver by him of any of his causes of action against Jones.

The Questions Submitted To the Jury Fairly Presented the Theories of Recovery and Defense

Jones contends that he was entitled to issues on estoppel, ratification, waiver and election. He further contends, without attempting to specify where, that there was evidence on these "defensive" issues. *Nowhere in this record* is there the slightest suggestion that Owen was estopped to assert his causes of action; that he ratified Jones's patent fraud; that he made a conscious decision to waive his known rights; or, that

[12]For clarity, the following reference is made: JX – Jones Exhibit.

he acquiesced in Jones's fraudulent conduct. The "Settlement Agreement," which merely recognized that the Bank was a holder in due course of the notes, is devoid of a syllable of evidence that would raise any of these issues. Nor could such Agreement, even if admissible, be used to "impeach" Owen's pleadings, much less his testimony. Nothing further need be said of this "constitutional" point.

Under Owen's Theories of Recovery, The Judgment Rendered For Him The Relief To Which He Was Entitled

As stated previously, Owen sued Jones for damages under Section 27.01 of the Bus. & Com. Code of Texas (old Art. 4004, V.A.T.S.); under the fraud provisions of the 1933 and 1934 Federal Securities Acts; and, for breach of his fiduciary relationship. Owen further alleged that Jones held all of his interest in the Bexar County land in trust for his benefit and should thus be made to convey that interest to him. Owen also sued Jones for an accounting for the secret profits he had made from the joint venture. All of these theories of recovery were submitted to the jury, who found all elements of these actions were violated by Jones (R. 428-450). Under the law, and based upon the jury's verdict, this judgment was proper.

As members of a joint venture, Jones and Owen owed to each other all the duties incident to any fiduciary relationship — a high degree of fidelity, scrupulous honesty, good faith and fair dealing. *DeWitt v. Sorenson*, 288 F.2d 455 (5th Cir. 1961); *Fitz-Gerald v. Hull*, 237 S.W.2d 256 (Tex.Sup. 1951). As the jury

found, Jones willfully and intentionally breached that high standard (R. 437; 448). The judgment, reflecting the jury's verdict, properly awarded Owen monetary damages and correctly impressed a lien on Jones's interest in the Bexar County property to secure that judgment. *Whittaker v. Wall*, 226 F.2d 868 (8th Cir. 1955). In *Whittaker*, suit was brought under the '33 Act to recover the consideration paid for unregistered fractional interests in oil and gas leases. Appellant objected to the court's awarding Appellees a lien on the securities, trust funds and other property to insure payment of the judgment. The Court said:

> "In the instant case, all parties are in court, all material issues are pleaded and the disputed relife is merely the exercise of the equity powers of the court in enforcing its judgment. Such extension of relief beyond that asked for in the pleadings has been approved by many cases, [citing cases] and Rule 54(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A., which provides as follows:
>
> > 'Except as to party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.'
>
> Resultantly, it is necessary only for the facts and issues of the case to support the judgment. [citing cases] The violation of the statute here observed is sufficient to warrant the judgment awarded and *we are convinced that the trial court, through specific liens, used a judicious means of enforcing*

> *it.* Likewise, we are convinced that the trial court correctly impressed upon the funds paid for drilling expenses an equitable trust for the benefit of the appellees. [citing cases]" (Ephasis added)

The actions of the trial judge in awarding Owen damages from Jones, in imposing a lien to secure that monetary award, and in decreeing that Jones held all of his interest in the Bexar County land in trust for Owen were, under the law and in equity, proper. In support of these actions see the often-cited cases of *DeWitt v. Sorenson*, supra; *Moe v. Lowry*, 194 P. 363 (Colo. Sup. 1921); *Donahue v. Davis*, 68 So.2d 163 (Fla.Sup. 1953); and, 46 Am.Jur.2d §51-52, *Joint Venturers*, pp. 71-73.

CONCLUSION AND PRAYER

Despite Petitioner's self-righteous histrionics, no amount of bleating, even if couched in terms of constitutional principles, will alter the fact that he wantonly and willfully defrauded Charles Owen, and the jury so found. The trial court's judgment, affirmed on appeal, properly awarded to Owen the relief to which he was entitled.

Because the decision of the Court of Appeals is eminently correct and the Petition for Writ of Certiorari does not present matters of sufficient consequence to warrant this Court's review of this case on certiorari, Respondent Charles Owen respectfully prays that the Petition for Writ of Certiorari be refused.

THOS. H. LAW

Thos. H. Law

TERRY GARDNER

Terry Gardner

Attorneys for Respondent
Charles Owen

Of Counsel:

LAW, SNAKARD, BROWN & GAMBILL
1500 Fort Worth National Bank Bldg.
Fort Worth, Texas 76102

CERTIFICATE OF MAILING

I, Terry Gardner, Attorney for Respondent Charles Owen, do hereby certify that the foregoing Reply to Petition for Writ of Certiorari has been served upon Mr. Henry W. Simon, Simon & Simon, Baker Building, Fort Worth, Texas 76102, Attorney for Respondent Nor-Tex Agencies, Inc., and W. E. Riley; upon Mr. Clyde M. Marshall, Jr., Callaway & Marshall, 1302 W. T. Waggoner Building, Fort Worth, Texas 76102, Attorney for Petitioner Richard M. Jones; upon Mr. Ogden K. Shannon, Jr., Shannon, Gracey, Ratliff & Miller, 2700 Continental National Bank Building, Fort Worth, Texas 76102, Attorney for Respondent Continental National Bank; and, upon The Solicitor General of the United States, Department of Justice, Washington, D. C. 20530 by depositing true copies of the same in a United States mail box, postage prepaid, on the 1st day of February, 1974.

Terry Gardner

APPENDIX

Section 27.01, Bus. & Com. Code of Texas

Section 27.01 Fraud in Real Estate and Stock Transactions

(a) Fraud is a transaction involving real estate or stock in a corporation or joint stock company consists of a

(1) false representation of a past or existing material fact, when the false representation is

(A) made to a person for the purpose of inducing that person to enter into a contract; and

(B) relied on by that person in entering into that contract; or

(2) false promise to do an act, when the false promise is

(A) material;

(B) made with the intention of not fulfilling it;

(C) made to a person for the purpose of inducing that person to enter into a contract; and

(D) relied on by that person in entering into that contract.

(b) A person who makes a false representation or false promise, and a person who benefits from that false representation or false promise, commit the

fraud described in Subsection (a) of this section and are jointly and severally liable to the person defrauded for actual damages. The measure of actual damages is the difference between the value of the real estate or stock as represented or promised, and its actual value in the condition in which it is delivered at the time of the contract.

(c) A person who wilfully makes a false representation or false promise, and a person who knowingly benefits from a false representation or false promise, commit the fraud described in Subsection (a) of this section and are liable to the person defrauded for exemplary damages not to exceed twice the amount of the actual damages.